

Federal Communications Commission

DA 00-167

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	
FM Broadcast Stations.)	
(Aberdeen, Elma, and Montesano,)	MM Docket No. 00-13
Washington))	RM-9679
)	
)	
(Elkhorn City and Coal Run, Kentucky))	MM Docket No. 00-14 ✓
)	RM-9803

NOTICE OF PROPOSED RULE MAKING

Adopted: January 28, 2000;

Released: February 4, 2000

Comment Date: March 20, 2000

Reply Comment Date: April 4, 2000

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a multiple docket Notice of Proposed Rule Making setting forth two separate proposals to amend the FM Table of Allotments, Section 73.202(b) of the Rules to specify a new community of license. Each petitioner has stated that it will apply for its requested channel, if allotted to the specified community. We believe that each proposal warrants consideration because it complies with our technical requirements and would serve the public interest.

2. Each proposal is filed in accordance with the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

Moreover, each proponent contends that its proposal would result in a preferential arrangement of allotments consistent with the FM allotment priorities set forth in the Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 91 (1982).¹

3. This is a multiple docket Notice of Proposed Rule Making issued in response to a Commission Public Notice released October 2, 1998 (DA 98-1987). We are combining separate FM allotment proposals into a single Notice of Proposed Rule Making. Each proposal has its own docket and rule making number and the Commission's Reference Center will maintain a separate file for each docket. As discussed in the Public Notice, this procedure will conserve Commission resources and expedite the processing of FM allotment petitions for rule making by avoiding duplicative actions. We request comments and/or counterproposals to the following proposals:

A. MM Docket No. 00-13; RM-9679

Petitioners: KAYO Broadcasting and Marrow, Inc.

Proposal: Joint petition requesting the reallocation of Channel 257C1 from Aberdeen to Elma, Washington, and the modification of Station KAYO-FM's license accordingly; the substitution of Channel 271C2 for Channel 271C3 at Elma, the reallocation of Channel 271C2 from Elma to Montesano, Washington, and the modification of Station KAPV(FM)'s license accordingly.² Neither reallocation would result in the removal of a sole local service, since petitioners are proposing herein the reallocation of Channel 257C1 from Aberdeen to Elma, Washington, and Aberdeen will continue to be served by local stations KDUX(FM), KYRO(AM) and KBKW(FM). Since Station KAPV(FM) seeks to change its transmitter site, petitioner has provided gain and loss area data.

We note that Station KAYO-FM does not seek to relocate its transmitter site, and that its current transmitter site at Aberdeen is authorized under Section 73.215 of the Commission's Rules, and in authorizing the use of contour protection methods at the application stage, the Commission specifically

¹ The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3).]

² In support of their proposal, petitioners state that the reallocation of Channel 271C2 to Montesano, Washington, would provide the community with its first local aural transmission service. Montesano is an incorporated community with a 1990 U.S. Census population of 3,247, and is the county seat of Grays Harbor County. Montesano has its own post office, zip code, and banks. Moreover, the upgrade would result in an increase of service to an area of 2,576 square kilometers with a population of 9,601 persons. There would be a very small loss of service that would not result in the creation of any white, gray, or underserved areas. Whereas, the proposed reallocation and upgrade would extend a 60 dBu signal to an underserved area of 698 square kilometers with a population of 2,145 persons.

has stated that it does not contemplate the use of directional antennas to create short-spaced allotments at the rule making stage, assuming it is Station KAYO-FM's intention to directionalize. Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 4 FCC Rcd 1681 (1989). However, Station KAYO-FM has specified an alternate transmitter site which meets the Commission's spacing requirements for the reallocation of Channel 257C1 to Elma, Washington. Therefore, we will propose to reallocate Channel 257C1 from Aberdeen to Elma at this fully-spaced site, as we have done in similar cases. See, e.g., Princeton and Elk River, Minnesota, MM Docket No. 98-208, released October 8, 1999, para. 3. Accordingly, KAYO Broadcasting is required to provide a gain and loss area study based on the fully-spaced allotment site proposed in this rule making proceeding. Neither proposed reallocation is located in or near an urbanized area, and thus, a Tuck analysis is not applicable.³ However, petitioners are requested to provide information as to the overall public interest benefits derived by the proposed reallocations.

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Aberdeen, Washington	257C1, 284C2	284C2
Elma, Washington	271C3	257C1
Montesano, Washington	---	271C2

Coordinates: The coordinates for Channel 257C1 at Elma are 46-57-31 NL and 123-35-18 WL with a site restriction of 14.5 kilometers (9.0 miles) west to avoid a short-spacing to the licensed site of Station KWJJ-FM, Channel 258C1, Portland, Oregon. An engineering analysis has determined that the allotment meets domestic spacing requirements and that Channel 257C1 can be reallocated to Elma as a specially-negotiated, short-spaced allotment because it is short-spaced to the licensed site of Station CFOX(FM), Channel 257C, Vancouver, British Columbia, and to the proposed allotment of Channel 258A at Metchosin/Sooke, British Columbia.

The coordinates for Channel 271C2 at Montesano are 47-03-44 NL and 123-44-44 WL. This allotment requires a site restriction of 14.5 kilometers (9.0 miles) northwest to avoid a short-spacing to the licensed site of Station KINK-FM, Channel 270C, Portland, Oregon.

³ See Headland, Alabama and Chattahoochee, Florida, 10 FCC Rcd 10352 (1995); Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951); RKO General, Inc., 5 FCC Rcd 3222 (1990); and Faye and Richard Tuck, 3 FCC Rcd 5374 (1988).

Additional Information: As requested, we propose to modify Station KAYO-FM's license to specify operation on Channel 257C1 at Elma, Washington, its new community of license. Likewise, we propose to modify Station KAPV(FM)'s license to specify operation on Channel 271C2 at Montesano, Washington, as its new community of license. Since Elma and Montesano are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been requested. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 257C1 at Elma, Washington, or for Channel 271C2 at Montesano, Washington.

FCC Contact: Sharon P. McDonald (202) 418-2180

B. MM Docket No. 00-14; RM-9803

Petitioner: East Kentucky Broadcasting Corporation

c/o Patricia M. Chuh,
Pepper & Corazzini, L.L.P.
1176 K Street, N.W, Suite 200
Washington, D.C. 20006

Proposal: Reallot Channel 276A from Elkhorn City to Coal Run, Kentucky, as the community's first local aural transmission service, and modify Station WPKE-FM's license accordingly.⁴ The reallotment of Channel 276A to Coal Run would not result in the removal of the sole local service since Station WBPA(AM) would remain licensed to the community, and Elkhorn City would continue to receive reception services from at least five full-time commercial stations. Since Station WPKE-FM seeks to change its transmitter site, petitioner has provided gain and loss area data. Petitioner asserts that the reallotment of Channel 276A to Coal Run would provide service to an area of 2,513 square kilometers (a gain of 298 square kilometers) to a population of 89,960 persons. This represents a gain of service to 39,922 persons and a loss of service to 19,508 persons, resulting in a net gain of service to 20,414 persons (an increase of 29.4%). We note that neither Elkhorn City nor Coal Run is located in or near an urbanized area, and thus, a Tuck analysis

⁴ In support of its proposal, petitioner states that Coal Run is an incorporated community with a 1990 U.S. Census population of 262 persons. It is self-governing with its own mayor, city commissioners, city attorney, city clerk, and volunteer fire department. There are numerous churches, organizations, and businesses which incorporate "Coal Run" in their names. Coal Run also collects property and occupational taxes.

is not applicable. However, petitioner is requested to provide information as to the overall public interest benefits that would be derived by the proposed reallocation, and to provide information regarding the number of full-time reception services in the actual gain and loss areas.

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Elkhorn City, Kentucky	276A	---
Coal Run, Kentucky	---	276A

Coordinates: The coordinates for Channel 276A at Elkhorn City are 37-23-57 NL and 82-30-32 WL.

Additional Information: This allotment does not require a site restriction. However, there should be no terrain blocking from the proposed Coal Run site to the city of Coal Run, provided a terrain elevation greater than 460 meters is available as stated by petitioner. As requested, we propose to modify Station WPKE-FM's license to specify operation on Channel 276A at Coal Run, Kentucky, as its new community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 276A at Coal Run, Kentucky.

FCC Contact: Sharon P. McDonald (202) 418-2180

4. Comments, reply comments, counterproposals and other pleadings filed in response to this multiple docket Notice of Proposed Rule Making should reference **only** the specific docket to which the filing pertains. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required in paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 20, 2000**, and reply comments on or before **April 4, 2000**, and are advised to read the Appendix for the proper procedure. Additionally, a copy of any filing should be served on the petitioner listed for the particular docket.

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of

the Commission's Rules. 46 FR 11549 (February 9, 1981).

7. For further information concerning a proceeding listed above, contact the FCC contact listed for that proceeding. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision in the applicable docket is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or any summary of any new information shall be served by the person making the presentation upon the other parties to the proceeding in particular docket unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall

be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W.; TW-A325, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Information Reference Center (Room CY-A257) at its headquarters, 445 12th Street, S.W., Washington D.C. 20554.